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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 470

R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,

And

BRIEF IN SUPPORT THEREOF.

JAMES C. HENRIQUES,
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Montgomery-Andrus Printing Co., Inc., 430-32 Chartres, N. O., La.

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R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of R. P. Farnsworth & Company, Inc., respectfully shows to your Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit on a bond given under the "Hurd Act" *(40 U. S. C. A., Sec. 270)*, which requires contractors for government construction to provide bonds conditioned upon the satisfactory performance of the construction contract and the payment of laborers and materialmen. The bond is in the prescribed form and runs to the United States as obligee.

Petitioner's contract was to construct certain buildings on the grounds of the United States Marine Hospital

in New Orleans for the contract price of $1,178,000.00. Respondent is an unpaid materialman who furnished materials to a sub-contractor of petitioner. Petitioner paid its said sub-contractor, who did not pay the materialman, and the said materialman brought this suit against petitioner in the name of the United States.

When this suit was instituted, the Hurd Act provided:

> "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and material shall . . . have a right of action . . . provided that . . . it . . . shall be commenced within one year after the performance and final settlement of said contract, and not later."

The present suit was brought on July 24, 1935 (R. 6), and the defense was that because final settlement had occurred on or prior to July 2, 1932, the suit was not brought within one year after final settlement and was, therefore, brought too late (R. 77-78). There is no dispute as to any fact bearing upon the date of final settlement.

The aforesaid contract was made for the United States by the Treasury Department.

By letter dated July 2, 1932, the Assistant Secretary of the Treasury, in response to a letter from R. P. Farnsworth & Company, Inc., states:

> "The building was occupied prior to the expiration of your contract time on January 2, 1932. There remained for correction, after the District Engi-

neer's final report of November 14, 1932, a number of minor items which the records indicate were completed by you without loss or inconvenience to the government. There is a balance due you under this contract of $4,332.80. You will be paid at this time on account of your said contract the sum of $4,250.00, the balance retained ($82.80), being considered sufficient to protect the government's interests pending final settlement of your contract." (R. 38).

By letter dated July 28th, 1934 (R. 51, 52)—which was two years after the aforequoted letter was written—the Director of Procurement reviewed and checked the record, which was then in the General Accounting Office, and recommended to the Secretary of the Treasury the payment of the $82.80 that the government had retained, as aforesaid.

The question involved is whether "performance and final settlement" of the contract between R. P. Farnsworth & Company, Inc., and the United States took place on or prior to July 2nd, 1932, when the Assistant Secretary of the Treasury determined the balance due Farnsworth under the contract and directed the payment of all said balance except $82.80, or on July 28th, 1934, when the Director of Procurement reviewed the record and recommended the payment of this $82.80, which had been retained.

When the case was tried before a jury in the United States District Court for the Eastern District of Louisiana, R. P. Farnsworth & Company, Inc., through its counsel, moved the Court to direct a verdict in its favor for the reason that the suit was instituted more than one year after

complete performance and final settlement (R. 259). The District Judge overruled the motion of defendant for a directed verdict and granted the motion of plaintiff for a directed verdict (R. 217, 262). The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court (R. 281-288), but not on the point that the suit was brought too late. On this point the Circuit Court of Appeals held that it was brought within one year from the date of performance and final settlement. Circuit Judge McCord dissented from this view (R. 287).

Motion was made by petitioner for a rehearing (R. 289), and same was denied with reasons on July 2, 1940, Circuit Judge McCord dissenting (R. 295).

The Circuit Court of Appeals held, "because of error touching imputation of payment," the cause was remanded "for further proceedings not inconsistent with this opinion." The opinion and judgment limits further proceedings solely to the issue of imputation and precludes petitioner from urging on the retrial of this suit the defense that same was filed too late. The supplemental answer, second defense, (R. 79-80), shows that payment of only $12,500.00 could be imputed, and if this judgment stand and relief is not now granted petitioner by this Court, it will be held liable for $7500.00, representing that portion of the amount sued for which cannot be "imputed".

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Fifth Circuit held that performance and final settlement took place not on or before July 2, 1932, when the claim was ex-

amined and approved by the Administrative Department having charge of the work and the amount due under the contract by the government to Farnsworth was determined, but on July 28, 1934, when the Director of Procurement examined the file, reviewed the record and recommended the payment of the $82.80 and that, therefore, the present suit had been commenced within one year after the performance and final settlement of the contract as required by the "Hurd Act". The Circuit Court of Appeals for the Fifth Circuit in so holding has decided an important question of federal law in a way in conflict with the applicable decisions of this Honorable Court.

2. The Circuit Court of Appeals for the Fifth Circuit erroneously held that the date of performance and final settlement was determined by the date when the Director of Procurement reviewed the record and recommended the payment of the $82.80. In so doing, the Circuit Court of Appeals for the Fifth Circuit created a conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

C.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9138, November Term, 1939, Electrical Supply Company v. R. P.

Farnsworth & Company, Inc., and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. F. FARNSWORTH & COMPANY, INC.

By:

JAMES C. HENRIQUES,
310 Union Building,
New Orleans, La.,
Attorney for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No.

R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The Judge of the United States District Court for the Eastern District of Louisiana rendered no opinion. He overruled petitioner's motion for a directed verdict and granted respondent's motion for a directed verdict (R. 217, 262). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 281) is reported in the *112 Fed. (2d) 150.* The opinion of the Circuit Court of Appeals denying the motion for a rehearing (R. 295) was filed July 2nd, 1940, not reported.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended, *28 U. S. C. A., Section 347.*

2. The date of the judgment to be reviewed, namely, the judgment of the Circuit Court of Appeals for the Fifth Circuit, is July 2nd, 1940, the date on which the motion for a rehearing was denied.

3. This case involves the interpretation of the Act of Congress approved August 13, 1894, *28 Stat. at L. 278, Chap. 280*, as amended, *40 U. S. C. A., Sec. 270*, known as the "Hurd Act". Said statute allows persons supplying labor or material to contractors or sub-contractors of contractors upon public buildings to bring suit upon the contractor's bond provided that such suit be commenced "within one year after the performance and final settlement of said contract, and not later."

4. The Circuit Court of Appeals for the Fifth Circuit held that the date upon which "performance and final settlement" was determined was July 28, 1934, when the Director of Procurement reviewed and checked the record, and recommended *the payment* of the balance due of $82.80 and not upon July 2, 1932, the date upon which the Administrative Department having charge of the work found that the contract was completed, approved the work and *determined the amount due* by the United States to the contractor and directed said amount to be paid it less $82.80 which was retained as sufficient to protect the government's interest. The case is, therefore, now reviewable by your Honorable Court upon writ of certiorari pursuant to Section 240a of the Judicial Code as aforesaid.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "A" in the petition for certiorari and in the

interest of brevity the statement is not repeated at this point.

In verification of that statement and in order that this Court may have a clear conception of why the $82.80 was retained by the government, we quote this excerpt from Circuit Judge McCord's opinion:

> "Farnsworth's contract called for the construction of a $1,178,000.00 building on the Marine Hospital Grounds. The record shows that the contract was completed within the agreed time and the letter from the Assistant Secretary of the Treasury on July 2, 1932, recited this fact. The letter further stated, 'There is a balance due you under this contract of $4,332.80. You will be paid at this time on account of your said contract the sum of four thousand two hundred fifty dollars ($4,250), the balance retained ($82.80), being considered sufficient to protect the Government's interests pending final settlement of your contract.'
>
> "Farnsworth had removed a portion of a brick wall on the hospital grounds to make a driveway to facilitate the moving of materials to the work site. The record shows that the $82.80 referred to in the letter of July 2, 1932, was retained by the Government to take care of the cost of replacing the brick wall in the event Farnsworth did not do so. This small sum was not being withheld pending final settlement of the $1,178,000 contract. Final settlement was in all things consummated as shown by the letter. The opening in the wall was being kept open by the contractor to move materials to another building which was being constructed by him

and under another and different contract from the one here under consideration. The Government, through duly authorized channels, determined the final balance due Farnsworth on the contract on July 2, 1932. . . ." (R. 287)

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in not ordering plaintiff's suit dismissed because it was filed too late.

2. The Circuit Court of appeals for the Fifth Circuit erred in not holding that the date of "performance and final settlement" was July 2, 1932, the date upon which the Assistant Secretary of the Treasury found that the contract had been completed and determined the balance due the contractor.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the date of performance and final settlement was the date upon which the Director of Procurement checked and reviewed the record (which was in the General Accounting Office) and recommended the payment of the $82.80.

4. The Circuit Court of Appeals for the Fifth Circuit erred in holding "not until the wall was rebuilt and the order passed to pay the $82.80 was there a final settlement of the contract" and also in holding "so long as the United States contend that the contractor must do something more and is holding back an amount, large or small, to secure full performance there is no final settlement of the contract."

5. The Circuit Court of Appeals for the Fifth Circuit erred in holding that the present suit was brought

within one year after the performance and final settlement of the contract.

V.

ARGUMENT.

Point A. The decision below is contrary to and in conflict with the decisions of this court in *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214*, and *Globe Indemnity Company v. United States, 291 U. S. 476.*

Point B. The decision below is in conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

POINT A.

The decision below is contrary to and in conflict with the decisions of this Court in *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214*, and *Globe Indemnity Company v. United States, 291 U. S. 476.*

In *Illinois Surety Company v. United States to the Use of J. A. Peeler, et al., 240 U. S. 214* (known as the Peeler case), it appears that the work under the contract was completed and on August 21, 1912, the Treasury Department, which was the Department in charge of the construction, "stated and determined the final balance" to be paid to the contractor. Payment was made on September 11, 1912, and suit was brought on March 4, 1913. Both of the courts below entered judgment in favor of the plaintiff and the surety brought the case to this court upon writ of error on the theory that performance and final settle-

ment took place September 11, 1912, and consequently that the suit was brought within six months of the date of performance and final settlement and was therefore premature. This court held that performance and final settlement took place on August 21, 1912, the date on which the Treasury Department, which was the Department in charge of the construction of the building, stated and determined the final balance due to the contractor. Consequently, the suit was not brought within six months of performance and final settlement and was not premature. At *pages 218-219*, Mr. Justice Hughes said:

> "The pivotal words are not 'final payment' but 'final settlement,' and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment."

On *page 221* of said same decision, the Justice said:

> ". . . it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words 'final settlement' in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the

time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained."

In the case of *Globe Indemnity Company v. U. S., etc., 291 U. S. 476, 481*, this Court, in the course of its opinion, after referring to the *Peeler* case, above quoted, and in reference to same said:

". . . The issue presented was whether suit by a sub-contractor upon a bond given under the Hurd Act was premature when begun six months after the date of the Department's determination, but less than six months after payment. It was held that it was not; that the term 'final settlement' in the Hurd Act was not intended to denote payment, but had been used to describe an administrative determination of the amount due upon completion of the contract. Similar determinations made by other departments before the enactment of the Budget and Accounting Act have repeatedly been held to constitute final settlement within the meaning of the Hurd Act."

Applying the above tests as enunciated in the foregoing deisions to the issue at bar, it will be seen that the letter of the Assistant Secretary of the Treasury, of date July 2, 1932, met the test and was the date of "final settlement" under the Hurd Act.

Under these decisions this Court holds final settlement as used in the Hurd Act does not mean final payment, but means the final determination by the proper Governmental Authority of the amount which the Government is finally bound to pay. The Assistant Secretary of

the Treasury was the proper Governmental Authority to make the determination of the amount due petitioner under this contract. He made the unconditional and final ascertainment that the balance due was $4332.80. He directed that $4250.00 be paid, and he determined that the $82.80 balance which was directed to be retained was sufficient to protect the government.

As a matter of fact, it made no difference whether the amount determined to be due was ever paid, as "final settlement" took place the moment the amount due Farnsworth was determined.

There is no decision by this court or any Circuit Court of Appeals in any of the Circuits which holds that the term "final settlement", as used in the Hurd Act, is determined by the test fixed by the Circuit Court of Appeals for the Fifth Circuit in this case.

POINT B.

The decision below is in conflict with the decisions of the Courts of Appeals for the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits.

1. The decision of the lower court is in conflict with the decisions of the Circuit Courts of Appeals for the respective circuits, above referred to, in that in all of their decisions they hold that the *sole and only test* of the date of final settlement under the Hurd Act is when, upon the completion of the contract, an administrative determination by the proper governmental authority of the amount due the contractor by the government or by the contractor to the government has been made.

In the case of *Consolidated Indemnity and Insurance Co. v. W. A. Smoot & Co., 57 F. (2d) 995*, the Circuit

Court of Appeals for the Fourth Circuit had before it a case for decision in which the facts were in effect identical with the facts in the present case. The case is particularly applicable because when the administrative officer of the government made the determination of the amount due by the government, he directed that $39.69 be withheld awaiting "final adjustment". It was contended that because of this retention there was no final settlement. On page 996, Headnote 1, the Court said:

> ". . . Final settlement as used in the Hurd Act does not mean final payment. 'It means the final determination by the proper governmental authority of the amount which the government is finally bound to pay or entitled to receive under the contract.' U. S., to Use of Stallings, v. Starr (C. C. A. 4th) 20 F. (2d) 803, 806; Illinois Surety Co. vs. United States, 240 U. S. 214, 36 S. Ct. 321, 60 L. Ed. 609; Arnold vs. U. S. (C. C. A. 4th) 280 F. 338; U. S. to Use of Union Gas Engine Co. v. Newport Shipbuilding Corporation (C. C. A. 4th) 18 F. (2d) 556. As said by the Circuit Court of Appeals for the Second Circuit in U. S. ex rel. Brown-Ketcham Iron Works v. Robinson, 214 F. 38, 40: 'In determining the time when materialmen may begin suit, it would not do to fix it at some day "after complete performance" merely. Defective work, damages for delay, and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to "complete performance of the contract and *final settlement thereof.*" We take it

> that these italicized words refer to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way'."

The following cases in the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits all hold that the term "final settlement" as used in the Hurd Act means an administrative determination of *the amount due* upon the completion of the contract.

U. S. to Use of Stallings, et als., v. Starr, et als., 20 F. (2d) 803, 806, 807, Headnote 6-8 (C. C. A. 4th); *Arnold v. U. S.*, 280 F. 338, 341, 342 (C. C. A. 4th); *United States Fidelity & Guaranty Co. v. U. S.*, 65 F. (2d) 639, 642 (C. C. A. 9th); *H. G. Christman Co., et al., v. Michigan Gypsum Co., et al.*, 85 F. (2d) 474, 476, 477 (C. C. A. 8th); *Fidelity & Casualty Co. of New York v. United States for Benefit of Daugherty, et al.*, 70 F. (2d) 895, 896, 897 (C. C. A. 6th); *National Surety Corporation v. Reynolds*, 87 F. (2d) 865, 867 (C. C. A. 8th); *Antrim Lumber Co. v. Hannan, et al.*, 18 F. (2d) 548, 549 (C. C. A. 8th); *United States v. Thomas Earle & Sons*, 99 F. (2d) 898 (C. C. A. 3rd); *Robinson v. U. S.*, 251 F. 461 (C. C. A. 2d); *U. S. v. Newport News Shipbuilding Co.*, 18 F. (2d) 556 (C. C. A. 4th); and *U. S. v. Arthur Storm Co.*, 101 F. (2d) 524 (C. C. A. 6th).

An examination of these cases will show the decision of the lower court is in conflict with all of the above decisions.

We have not quoted from these decisions, but, for convenience of the Court, have given the title of the case, volume, page and the exact page applicable to the point at issue.

2. The lower court in the opinion denying a rehearing (R. 295), held:

> ". . . So long as the United States contend that the contractor must do something more and is holding back an amount, large or small, to secure full performance, there is no final settlement of the contract."

This decision and holding by the lower court is in conflict with the decisions of the Circuit Courts of Appeals in the following cases:

Consolidated Indemnity & Ins. Co. v. W. A. Smoot & Co., 57 F. (2d) 995 (C. C. A. 4th), Certiorari denied 287 U. S. 613; *United States to Use of Stallings v. Starr*, 20 F. (2d) 803 (C. C. A. 4th); *Antrim Lumber Co. v. Hannan*, 18 F. (2d) 548 (C. C. A. 8th); *United States for Use of R. Haas Electric & Mfg. Co. v. Title Guaranty & Surety Co.*, 254 Fed. 958 (C. C. A. 7th); *Robinson v. United States to the Use of Brown-Ketcham Iron Works*, 251 Fed. 461 (C. C. A. 2d); *United States ex rel. Brown-Ketcham Iron Works v. Robinson*, 214 Fed. 38 (C. C. A. 2d); *United States v. Thomas Earle & Sons*, 99 F. (2d) 898 (C. C. A. 3d); *United States v. Arthur Storm*, 101 F. (2d) 524 (C. C. A. 6th); *Fidelity & Casualty Company of New York v. United States*, 70 F. (2d) 895 (C. C. A. 6th); *H. G. Christman Company, et al., v. Michigan Gypsum Co., et al.*, 85 F. (2d) 474, 476 (C. C. A. 8th).

The Circuit Courts of Appeals in the above cited cases held "performance and final settlement" might take

place although the amount due the contractor was subject to change or a portion thereof was retained. The important thing for the purpose of suits under the Hurd Act was the date on which the department having charge of the work determines that it has been performed and determines the amount due the contractor and not the date on which minor disputes or matters of accounting are disposed of.

As examples to show that the decision of the lower court was in conflict with decisions of Circuit Courts of Appeals in other circuits, we find that in the *Smoot* case, *57 F. (2d) 995*, $39.69 was withheld awaiting "final adjustment".

In the *Thomas Earle* case, *99 F. (2d) 998*, $2729.72 was retained "pending adjustment of liquidated damages ($1829.72) and removal of sunken barge ($900.00)."

In the *Robinson* case, *214 Fed. 38, 40*, 15% of the contract price was retained to cover "overtime damages" and "omissions, defects and unfinished items". In all of the other cases above quoted under this point, amounts were retained to cover claims for liquidated damages or defects and omissions.

The Circuit Court of Appeals for the Second Circuit in the case of *Robinson v. U. S., 251 F. 461, 466*, in holding that minor disputes or the retention of the amount found to be due should not delay the date of final settlement pointed out:

> ". . . Any other construction would inevitably lead to the defeat of some of the essential purposes for which the statute was enacted. A subcontractor who had performed his work would be compelled to

wait for some indefinite period because some other subcontractor, or the main contractor himself by reason of some default or dispute, made necessary the reservation of a certain sum to make good that default or dispose of that dispute. It can readily be seen that in a contract involving, as did the contract at bar, over a million dollars, a subcontractor could be kept out of his money because of a dispute over a comparatively small sum, notwithstanding the fact that the government was satisfied to the point where it no longer looked to the surety bonds. Remembering that the purpose of the statute in this regard was to protect the United States, it follows that there is no merit in the contention that the subcontractor must wait to begin his action until disputes as to completion are finally settled, notwithstanding that the government on its part is entirely satisfied and approves the final settlement of the contract."

Be it noted that in the present case the contract was for the construction of a $1,178,000 building. On July 2, 1932, the proper officer of the government determined that the contract was completed and the building occupied by the government within the agreed time and likewise determined the balance due the contractor to be $4332.80, and directed the payment of all of this amount except $82.80. More than two years elapsed before this amount was paid. This amount was retained to cover the cost of replacement of a small opening in the wall which surrounded the Marine Hospital grounds and which was kept open by the contractor to move materials to another building which was being constructed by him under an-

other and different contract. The replacement of the wall *formed no part of the contract* and therefore the replacement of the wall had nothing to do with the "performance and final settlement" of the contract. Judge McCord was careful to point this out in his opinion. Yet, under the decision of the lower court, no laborer or materialman could have brought suit until this opening in the wall was closed.

We stated in the petition, "there is no dispute as to any fact bearing upon the date of final settlement". This statement is correct. The facts are that the date of final settlement as used in the Hurd Act is determined by either the letter of July 2, 1932, or the letter of July 28, 1934. The only dispute is the conclusion that flows from the findings and determinations made in these letters.

The main defense in this case is that the suit was filed too late.

We pointed out in the petition that the Circuit Court of Appeals, by its judgment (R. 288), has limited the trial on the remand to the issue of imputation and that if petitioner should be successful in maintaining this defense for the full amount claimed, it would still have a judgment rendered against it for at least $7500.00, plus interest. This clearly shows that unless relief is now granted by this Court, a judgment shall be rendered against it which is erroneous.

It is clear, therefore, that the Circuit Court of Appeals for the Fifth Circuit, in the decision below, has decided an important question of federal law in a way in conflict with the applicable decisions of this Court, and has created a conflict with the decisions of the Courts of Ap-

peals for six of the nine Circuits. Ever since the decision in the *Peeler* case, over thirty-four years ago, every Circuit Court of Appeals, with two exceptions, when this issue has arisen has followed the decisions of this Court in the *Peeler* and *Globe Indemnity* cases. The two exceptions are the decision in this case and the decision by the Court of Appeals for the Second Circuit in the *Globe Indemnity* case, *66 F. (2d) 302*, in which latter case this Court granted a writ of certiorari and reversed same.

Respectfully submitted,

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GORDON BOSWELL,
Of Counsel.

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R. P. FARNSWORTH & COMPANY, INC.,
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REPLY BRIEF ON BEHALF OF PETITIONER, R. P. FARNSWORTH & COMPANY, INC.

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Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

Subject Index.

Authorities Cited.

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REPLY BRIEF ON BEHALF OF PETITIONER, R. P. FARNSWORTH & COMPANY, INC.

To the Honorable Supreme Court of the United States:

This brief is written as a reply to a new issue injected in this cause by respondent and one which could not have been anticipated when petitioner filed its original brief.

ARGUMENT.

I.

Counsel for respondent contend that petitioner has not, *in the petition*, made any statement "disclosing the basis upon which it was contended that this Court has

jurisdiction to review the judgment and decree" of the lower court, nor has it set forth "the question presented."

In this they are clearly in error.

We have not, *in the petition*, indulged in argumentative pleading or conclusions of law to show the "basis upon which we contend this Court has jurisdiction to review the judgment", nor upon the "question presented". We have confined *our argument* upon these issues *to the brief*.

In drafting the petition, we were meticulous *to set out the facts* which are the basis of our contention that this Court has jurisdiction to review said judgment. We followed Rule 12, paragraph 1. The *facts* set out in the petition are:

1. The judgment to be reviewed is a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. (Petition, page 4).

2. The suit involved the interpretation of a Federal Statute. We have referred to the statute, we gave the volume and page where the statute may be found, and quoted its "pertinent provisions". (Petition, pages 1 and 2).

3. A rehearing was refused on July 2nd, 1940. (Petition, page 4). This allegation was solely to show application was filed in this Court within three months and the Court, therefore, has jurisdiction to entertain same.

4. The nature of the case and the rulings of the Court. (Petition, pages 2, 3 and 4).

5. Specification of "the stage of the proceedings in the court of first instance and the Appellate Court" at which and the manner in which the questions sought to be reviewed were raised. (Petition, pages 3 and 4).

6. "The way in which they were passed upon by th Court" with a summary of same and "specific reference to the places in the record where the matter appears". (Petition, pages 3 and 4).

7. That the holding by the Court of Appeals was in conflict with the applicable decisions of this Court and created a conflict with the decisions of the Courts of Appeal for the Second, Fourth, Sixth, Eighth and Ninth Circuits. (Petition, page 5).

In other words, we have stated in the petition allegations of *fact* which Rule 12, paragraph 1, states should be set forth. We do not understand that under the Rules a label or heading is necessary so long as the statement of facts in the petition are the sacramental facts required by Rule 12, paragraph 1. It was our endeavor to make the petition as brief as possible and avoid unnecessary repetition. In the brief we drew our conclusions from the factual statements set forth in the petition.

On the point that the petition fails to state the "question presented", we state on page three of the petition:

> "The question involved is whether 'performance and final settlement' of the contract between R. P. Farnsworth & Company, Inc., and the United States took place on or prior to July 2nd, 1932, when the Assistant Secretary of the Treasury determined the balance due Farnsworth under

> the contract and directed the payment of all said balance except $82.80, or on July 28th, 1934, when the Director of Procurement reviewed the record and recommended the payment of this $82.80, which had been retained."

We do not know how the "question presented" could have been more clearly set forth.

II.

No reply to the argument made by respondents on the merits is necessary for the reason that the decisions of this Court and the respective Courts of Appeals cited in our brief filed with the petition are complete answers to the contentions of counsel for respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 470

R. P. FARNSWORTH & COMPANY, INC.,
Petitioner,

versus

ELECTRICAL SUPPLY COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The Respondent in the above proceedings, Electrical Supply Company, respectfully presents this brief in opposition to the petition for a writ of certiorari, filed herein, and in reply to Petitioner's brief in support thereof.

OPINIONS BELOW

The opinion of the District Court (R. 217) was not reported.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 281) is reported in 112 F. 2d. 150.

The opinion of the Circuit Court of Appeals for the Fifth Circuit denying the motion for a rehearing (R. 295) is not reported.

ARGUMENT

At the outset, it is respectfully submitted that this is not a matter in which sound judicial discretion would warrant a review on writ of certiorari, as there are neither special nor important reasons for the granting of the petition.

Petitioner says, on page five of the petition, that the decision of the Circuit Court of Appeals for the Fifth Circuit has created a conflict with decisions of this Honorable Court and with the decisions of the Courts of Appeals for other circuits. However, it is not only respectfully submitted that even a superficial examination will show that the decision sought to be reviewed is in absolute accord with the decisions of this Honorable Court on the subject, as well as with the decisions in all of the circuits where the point has been decided; but even the Heard Act, which is the statute involved in the case, has been, as your Honors are well aware, superseded by the Act of August 24, 1935, c. 642 (Public No. 321, 49 Stat. 793) so that even if there were a conflict of decisions, which is denied, there would certainly be no reason of public interest which would warrant a review of this case on a writ of certiorari. In fact, the petition here filed involves nothing but the usual, and always-to-be-expected, dissatisfaction of a defeated litigant.

It is, therefore, respectfully submitted that there is nothing here involved which would warrant taking the time of this Honorable Court to review the decision which the Petitioner finds so distasteful.

RULES NOT COMPLIED WITH

Be that as it may, however, we respectfully submit that, in filing its petition for a writ of certiorari, the

Petitioner has not complied with the Rules of this Honorable Court, as Rule 38-(2), adopted February 13, 1939, effective February 27, 1939, relating to writs of certiorari, provides, in part, as follows:

> "(2) The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition."

It will be noted that, according to this Rule 38-(2), a petition for certiorari must contain not only a statement of the matter involved and the reasons relied on for the allowance of the writ, but also (1) the questions presented and (2) a jurisdictional statement.

Even should it be conceded that the next to the last paragraph on page three of the petition is a sufficient statement of the questions presented (and that may be doubted) it is apparent that the petition does not even attempt to set forth a jurisdictional statement. On the contrary, no jurisdictional statement is to be found except in the brief (pp. 7-8); but the brief is not a part of the petition. *General Talking Pictures Corporation v. Western Electric Company*, 304 U. S. 175, 178.

It would appear, therefore, that the petition in the instant case was drawn without any consideration being given to the revision of the Rules of this Honorable Court

in 1939, for, prior to such revision, Rule 38-(2) merely required that the petition contain a statement of the matter involved and the reasons relied on for the allowance of the writ. This is all that is contained in the petition now under consideration, and we respectfully submit, therefore, that the failure of Petitioner to comply with the requirements of Rule 38-(2), as amended in 1939, "will be a sufficient reason for denying the petition".

NO MERIT IN PETITION

However, even if this Honorable Court gives further consideration to the petition, we respectfully submit that there is no merit in it and that it should be denied.

On the second page of the petition, it is stated that there is no dispute as to any fact bearing upon the date of final settlement. This, of course, is perfectly true, because, in this case, the date of final settlement was a question of law and not of fact; but it is not stated until practically the end of the brief (p. 20) that there was a serious dispute as to which document constituted final settlement under the Heard Act.

On the second and third pages of the petition, there is a partial quotation from a certain letter (R. 38) dated July 2, 1932, which Petitioner asserts constituted "final settlement", and on the third page of the petition there is a rather cursory reference to a letter (R. 51) dated July 28, 1934, in which letter Petitioner says the Director of Procurement reviewed and checked the record.

It is this letter (R. 51) dated July 28, 1934, which we contend constituted "final settlement", and, of course, your Honors are aware that the office of Director of Procurement (to be the head of the Procurement Division, to which division the office of the Supervising Architect

of the Treasury Department was transferred) was created by an executive order issued by President Roosevelt, under date of June 10, 1933, under and pursuant to Section 16 of Title II of the Act of March 3, 1933, c. 212 (Public No. 428, 47 Stat. 1489, 1517).

In fact, we are so strongly of the opinion, that, in order to determine the date of "final settlement", it is only necessary to read said letters of July 2, 1932 and July 28, 1934, side by side, that we have taken the liberty of printing them (with certain words emphasized by us) as a part of this brief; and your Honors will find them on the following insert pages.

(R. 38)

TREASURY DEPARTMENT
WASHINGTON

July 2, 1932.

R. P. Farnsworth & Co.,
925 Maritime Building,
New Orleans, Louisiana.
Gentlemen:

In connection with your first contract at the New Orleans, La., Marine Hospital, for the construction of main building, etc., reference is made to your letter of June 21, 1932, requesting payment on account of $4,250, **pending final settlement of the contract,** which is held up by the necessity of referring to the Comptroller General the question of piling, for which you ask additional compensation.

The building was occupied prior to the expiration of your contract time on Jan. 2, 1932. There remained for correction, after the District Engineer's final report of Nov. 14, 1932, a number of minor items which the records indicate were completed by you without loss or inconvenience to the Government. There is a balance due you under this contract of $4,332.80. You will be paid at this time on account of your said contract the sum of $4,250.00, the balance retained ($82.80), being considered sufficient to protect the Government's interests **pending final settlement of your contract.**

Payment will be made from the appropriation "Marine Hospital, New Orleans, La.".

This modification of your contract is made upon the express condition that it is subject generally to all the contract stipulations and covenants; **that it is without prejudice to any and all rights of the United States under your contract and bond;** and that you shall first furnish **the formal consent of your surety to the said modification,** a form for which consent will be forwarded under separate cover for prompt execution and return here.

Respectfully,
(Signed) Ferry K. Heath,
Assistant Secretary of the Treasury.

(R. 51)

TREASURY DEPARTMENT
WASHINGTON

July 28, 1934.

Procurement Division
Public Works Branch
The Honorable,
The Secretary of the Treasury.
Sir:

The following report and recommendation are submitted relative to the contract with R. P. Farnsworth and Company, Inc., of New Orleans, Louisiana, for construction of the Marine Hospital, New Orleans, Louisiana:

Date of contract	June 28, 1930.
Time for completion, as extended	547 days from July 11, 1930
Liquidated damages for delay	$100.00 per day.
Amount of contract as originally awarded	$1,178,000.00
Additions, from time to time	34,251.88
	$1,212,251.88
Deductions, from time to time	3,027.14
	$1,209,224.74
Payments on account	1,209,141.94
Balance	$ 82.80

The time for completion of this contract as extended, expired on January 9, 1932.

A review of the records relative to the contract indicates that the work was satisfactorily completed by December 3, 1931, with the exception of certain defects and omissions. These items were corrected or supplied by February 24, 1932, and being minor in character, the delay in completion of same did not interfere with the activities in the buildings or cause any loss or inconvenience to the Government. Subsequently, certain other minor defects developed in the work, which were adjusted by June 2, 1932.

Final settlement of this contract has been withheld pending the replacement of a section of brick wall by the contractors. This section of wall was removed for a driveway and was not replaced until September 15, 1933 after the contractors had completed two other contracts at the Hospital. **There is also pending the matter of an additional bond** which the contractors were requested to furnish due to the fact that the original Surety on their bond was deemed no longer sufficient security, but the bond has not been received.

In view of the fact that there was no delay in actual completion of the work and that the apparent delay in final completion of the contract due to the correction of defects and omissions, caused no loss or inconvenience to the Government, **it is recommended that liquidated damages be waived** and authority be given for the payment of the balance due, viz., $82.80, from the appropriation, "Marine Hospital, New Orleans, Louisiana".

It is further recommended in view of the fact that no additional bond has been obtained, that the contract be referred to the Comptroller General of the United States for direct payment.

Respectfully,

C. J. Peoples

Director of Procurement.

APPROVED, DAMAGES WAIVED, AND CONTRACT REFERRED TO COMPTROLLER GENERAL FOR DIRECT PAYMENT.

JULY 28, 1934.

H. Morgenthau, Jr.

Secretary of the Treasury.

Your Honors will see instantly that the letter of July 2, 1932 did not even purport to be a "final settlement", but was specifically written as a "modification" of Petitioner's contract, without prejudice to any and all rights of the United States under Petitioner's contract and bond, and subject to Petitioner first furnishing the formal consent of its surety to said modification, which formal consent (R. 36) was in fact furnished before the payment was made. Moreover, in two places, the letter said that the modification of the contract was being made "pending final settlement," so we find it very hard to understand how anyone could construe said letter as "final settlement" under the Heard Act.

On the contrary, your Honors will find that the letter of July 28, 1934 (R. 51) specifically stated that, up to that time, "final settlement" of the contract had been withheld, and, on said 28th day of July, 1934, for the first time, liquidated damages were waived and authority given for the "final settlement" of the contract.

It is respectfully submitted that counsel for the Petitioner has permitted the small amount withheld in this case, namely, $82.80, to obstruct his view of the legal principles involved; and, with all due deference to the opinion of Judge McCord, we respectfully submit that the decision sought to be reviewed is in absolute agreement with the decisions of this Honorable Court on the subject, and with the decisions of all of the Circuit Courts of Appeals where the subject has been considered; and that, therefore, the petition for a writ of certiorari should be denied.

CASES RELIED ON

As a matter of fact, counsel for both sides relied, in the District Court and in the Circuit Court of Appeals

for the Fifth Circuit, on exactly the same authorities, namely, the opinions of this Honorable Court in the *Peeler* case, 240 U. S. 214, and in the *Globe Indemnity Company* case, 291 U. S. 476, as well as on a large number of cases decided in the various circuits, the only conflict which then existed, or which now exists, being in the fact that our learned opponent says that the decision below was contrary to the above mentioned cases, whereas we contend that the decision below is in absolute accord with them.

It is therefore respectfully submitted that there is absolutely no warrant in this case for the exercise by this Honorable Court of its supervisory authority, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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